

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2023

~~76-7235~~

to Be Argued by

United States Court of Appeals
For The Second Circuit

JAMES B. KOBAK, JR.

Docket No. 77-2023

UNITED STATES OF AMERICA, ex rel.
VICTOR MAYO,

Petitioner-Appellant

-against-

RAY BOMBARD, Superintendent of Greenhaven
Correctional Facility at Stormville, New York,

Respondent-Appellee

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR PETITIONER-APPELLANT

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Table of Contents

	<u>Page</u>
Table of Authorities	iii
Cases	iii
Constitutional Provisions and	viii
Statutes	
Other Authorities	xi
Preliminary Statement	1
Issues Presented for Review	3
STATEMENT OF THE CASE	3
Ripeness	3
Exhaustion of State Remedies	5
The 1972 Federal Proceedings	6
The Candy Store Robbery and	7
Mayo's Arrest	
Mayo's Background	8
"Throwing in the Towel"	11
The Presentence Report	15
The Opinion Below	19

ARGUMENT	21
I. MAYO WAS DENIED A FAIR TRIAL BECAUSE NO INQUIRY INTO HIS COMPETENCE WAS MADE DESPITE THE DOUBTS RAISED BY THE PRESENTENCE REPORT	21
II. MAYO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO INVESTIGATE MATTERS MATERIAL TO HIS DEFENSE.	31
A. Trial Counsel's Failure to Inquire About Mayo's Background and Investigate Mayo's History of Mental Illness Constituted Ineffective Assistance of Counsel In Themselves	34
B. Trial Counsel's Failure to Investigate Deprived Mayo of a Fair Trial and Meaningful Representation of His Interests	41
Conclusion	45

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<u>Beasley v. United States</u> , 491 F.2d 687 (6th Cir. 1974)	45
<u>Brescia v. New Jersey</u> , 417 U.S. 921 (1974)	34
<u>Brubaker v. Dickson</u> , 310 F.2d 30 (9th Cir. 1962), <u>cert. denied</u> , 372 U.S. 978 (1963)	35, 36n.13, 43
<u>Drope v. Missouri</u> , 420 U.S. 162 (1975)	7n.4, 21, 22, 23, 25, 29n.10
<u>Dusky v. United States</u> , 362 U.S. 402 (1960)	21
<u>Fikes v. Alabama</u> , 352 U.S. 191 (1957)	35n.12
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963)	32
<u>Hawk v. Olson</u> , 326 U.S. 271 (1945)	34
<u>Henderson v. Morgan</u> , U.S. , 96 S. Ct. 2253 (1976)	32n.11
<u>In re Saunders</u> , 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970)	36
<u>Jones v. Huff</u> , 152 F.2d 14 (D.C. Cir. 1945)	44
<u>McMann v. Richardson</u> , 397 U.S. 759 (1970)	32n.11
<u>McQueen v. Swenson</u> , 498 F.2d 207 (8th Cir. 1974)	34-35, 37
<u>Moore v. United States</u> , 464 F.2d 663 (9th Cir. 1972)	23, 24, 29
<u>Moore v. United States</u> , 432 F.2d 730 (3d Cir. 1970)	33

TABLE OF AUTHORITIES

Cases	Page	
<u>Owsley v. Peyton</u> , 368 F.2d 1002 (4th Cir. 1966)	35	
<u>Pate v. Robinson</u> , 383 U.S. 375 (1966)	7n.4, 21, 23	
<u>People v. Bangert</u> , 22 N.Y.2d 799, 239 N.E.2d 644, 292 N.Y.S.2d 900 (1968)	18	
<u>People v. Bennett</u> , 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972)	35, 36, 37	
<u>People v. Boundy</u> , 10 N.Y. 2d 518, 180 N.E.2d 565, 225 N.Y.S.2d 207 (1962)	39n.14	4
<u>People v. Hudson</u> , 19 N.Y.2d 137, 225 N.E.2d 193, 278 N.Y.S.2d 593 (1967), <u>cert. denied</u> , 398 U.S. 944 (1970)	18	2
<u>People v. Mayo</u> , 41 App. Div. 2d 903, 342 N.Y.S. 2d 828 (2d Dep't 1973)	5	
<u>People v. Mayo</u> , 32 App. Div. 2d 893, 302 N.Y.S.2d 999 (2d Dep't 1960)	5	7
<u>People v. Smyth</u> , 3 N.Y.2d 184, 143 N.E.2d 922, 164 N.Y.S.2d 737 (1957)	39n.14	
<u>People v. Sprague</u> , 11 N.Y.2d 951, 183 N.E.2d 232, 228 N.Y.S.2d 832 (1962)	39n.14	3
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932)	32, 34, 36	0

0

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Rand v. Swenson</u> , 501 F.2d 394 (8th Cir. 1974)	23
<u>Reynolds v. Cochran</u> , 365 U.S. 525 (1961)	32
<u>Rickenbacker v. Warden</u> , Docket No. 76-2036 (2d Cir. December 22, 1976)	33
<u>Saltys v. Adams</u> , 465 F.2d 1023 (2d Cir. 1972)	34
<u>Smotherman v. Beto</u> , 276 F. Supp. 579 (N.D. Tex. 1967)	42, 44
<u>Spano v. New York</u> , 360 U.S. 315 (1959)	35n.12
<u>State v. Harper</u> , 57 Wisc. 2d 543, 205 N.W. 2d 1 (1973)	37
<u>Tinsley v. United States</u> , No. 75-1607 (4th Cir. April 5, 1976)	40
<u>United States v. DeCoster</u> , 487 F.2d 1197 (D.C. Cir. 1973)	33, 37
<u>United States v. DiGilio</u> , 538 F.2d 972 (3d Cir. 1976), <u>appeal pending</u>	23
<u>United States v. Garguilo</u> , 324 F.2d 795 (2d Cir. 1963)	36n.13
<u>United States v. Hall</u> , 523 F.2d 665 (2d Cir. 1975)	29n.10
<u>United States v. Masters</u> , 539 F.2d 721 (D.C. Cir. 1976)	29n.10
<u>United States v. Morrissey</u> , 461 F.2d 666 (2d Cir. 1972)	35

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>United States v. Polisi, 514 F.2d 977</u> (2d Cir. 1975)	25
<u>United States v. Vowteras, 500 F.2d 1210</u> (2d Cir.), <u>cert. denied</u> , 419 U.S. 1069 (1975)	29n.10
<u>United States v. Wight, 176 F.2d 376 (2d Cir.</u> 1949), <u>cert. denied</u> , 338 U.S. 950 (1950)	42
<u>United States v. Wright, 489 F.2d 1181</u> (D.C. Cir. 1973)	37
<u>United States v. Yanishevsky, 500 F.2d</u> 1327 (2d Cir. 1974)	36n.13
<u>United States ex rel. Evans v. Kropp,</u> 254 F. Supp. 218 (S.D.Mich. 1966)	29
<u>United States ex rel. Marcelin v. Mancusi,</u> 462 F.2d 36 (2d Cir. 1972), <u>cert. denied</u> , 410 U.S. 917 (1973)	35, 36n.13
<u>United States ex rel. Maselli v. Reincke,</u> 383 F.2d 129 (2d Cir. 1967)	33
<u>United States ex rel. Thomas v. Zelker,</u> 332 F. Supp. 595 (S.D.N.Y. 1971)	35

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>United States ex rel. Williams v. Twomey,</u> 510 F.2d 634 (7th Cir.) <u>cert. denied,</u> 423 U.S. 876 (1974)	32-33
<u>Walker v. Caldwell,</u> 476 F.2d 213 (5th Cir. 1973)	42
<u>West v. Louisiana,</u> 476 F.2d 1026 (5th Cir. 1973), <u>modified on other grounds</u> <u>en banc,</u> 510 F.2d 363 (5th Cir. 1975)	44

Constitutional Provisions and Statutes

	<u>Page</u>
U.S. Const., amend. VI	31, 32
U.S. Const., amend. XIV	32
18 U.S.C. § 4208(b)	25
18 U.S.C. §4244	23, 25, 26
28 U.S.C. § 2253	1
L. 1936, ch. 70, § 1, <u>amending</u> New York Penal Law 1909, § 2189, now New York Penal Law § 70.00(1 & (3) McKinney 1975)	4n.3
New York Penal Law § 70.10 (McKinney 1975)	4
Former Section 658 of the New York Code of Criminal Procedure, L. 1939, ch. 861, § 2	14n.6, 26, 39n.14

Other Authorities

	<u>Page</u>
<u>ABA Standards Relating to the Defense Function</u> (Tent. Draft 1970, approved 1971)	
§ 3.2(a) official comment	36-37
§ 4.1 & official comment	37-39
§ 8.1(b)	39
<u>Bazelon, The Defective Assistance of Counsel,</u> 42 U. Cin. L. Rev. 1 (1973)	37
<u>Bines, Remedying Ineffective Representation</u> <u>in Criminal Cases: Departures from</u> <u>Habeas Corpus, 59 Va. L. Rev. 927 (1973)</u>	33
<u>Finer, Ineffective Assistance of Counsel,</u> 58 Cornell L. Rev. 1077 (1973)	33
<u>Note, The Jailed Pro Se Defendant and the</u> <u>Right to Prepare a Defense, 86 Yale</u> <u>L. J. 292 (1976)</u>	33

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On Appeal From the United States District Court
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BRIEF FOR PETITIONER-RESPONDENT

Preliminary Statement

Petitioner-Appellant Victor Mayo submits this brief in support of his appeal pursuant to 28 U.S.C. § 2253 from an opinion and order of the United States District Court for the Southern District of New York, John M. Cannella, J., entered January 5, 1977, which denied Mayo's petition for a writ of habeas corpus. The opinion is unreported but appears at pages 315 through 322 of the Appendix.

The petition arises from Mayo's robbery in 1960 of seventeen dollars from a candy store. At the time Mayo was seventeen years old. Prior to the robbery Mayo had spent all but a few months of his life in foster homes or mental institutions; had been certified as "mentally ill"; and had been diagnosed as a schizophrenic and uncommunicative personality with possible brain damage and a marginal intelligence in records maintained by State mental hospitals and other public institutions.

The facts that Mayo had a "history of mental illness" and had been committed to a State mental hospital for five and a half years were known to the State Court and to Mayo's counsel at the time Mayo was sentenced, yet neither the Court nor counsel made any effort to inquire into his competency to stand trial. The State has subsequently conceded that the trial court's failure to inquire¹ into competency violated due process standards (A. 269-70). Mayo thus contends that his conviction should be vacated. Mayo also contends that he was denied effective assistance of counsel because his assigned attorney has admitted not having had "sufficient experience" (A. 127) either to ask routine background questions before trial or to investigate Mayo's history of mental illness after it was disclosed at sentencing.

1. References to materials in Petitioner's informally re-numbered Appendix will be made in the form "A. ____".

Issues Presented for Review

1. Whether Mayo's 1960 conviction should be vacated because no inquiry into competence was made by the trial court when (a) the State has conceded that "the trial court was bound to make some inquiry into petitioner's mental state" because of the references to Mayo's history of mental illness and institutionalization in a presentence report and (b) other information relating to Mayo's mental impairments could have been obtained from the State's own records?

2. Whether Mayo was denied effective assistance of counsel because his recently admitted attorney failed to ask routine background questions about material matters and failed even to investigate the history of mental illness disclosed at the time of sentencing?

STATEMENT OF THE CASE

Ripeness

The conviction that Mayo challenges is that for the robbery of \$17 and related crimes² in 1960. Mayo is still in the custody of the State but for a 1966 conviction based on a plea of guilty to a manslaughter indictment. Be-

2. Mayo was convicted of robbery in the third degree, petit larceny and assault in the second degree.

cause of the 1960 robbery conviction, Mayo was sentenced for his 1966 crime under a "recidivist statute" (former New York Penal Law § 1941) and received a fifteen to twenty-five year sentence. Had Mayo not been illegally convicted in 1960 -- and were his robbery conviction vacated today -- the applicable sentencing statute would be former Section 2189 of the Penal Law.³ The minimum sentence under that statute is not less than one year nor more than ten, and the maximum is not more than twenty years -- five years less than the maximum term he received under the recidivist statute in 1966.

Mayo was paroled between the time his petition was filed and the time Judge Cannella handed down his decision. Parole, of course, does not moot the petition for the reasons stated in the opinion below. (A. 316) Parole is custody, and the period of Mayo's custody will still be longer than it could have been had Mayo not been unconstitutionally convicted in 1960. In addition, Mayo faces the risk that, should he commit another crime, he could be sentenced to life in prison as a "three-time loser" under Section 70.10 of the

3. L. 1936, ch 70, § 1, amending Penal Law 1909, § 2189, now Penal Law § 70.00(1) & (3)(McKinney 1975).

New York Penal Code. If his first conviction were vacated, of course, this risk would no longer exist.

Exhaustion of State Remedies

Mayo has exhausted his State remedies with respect to the issues of competency and ineffective assistance of counsel. A writ of error coram nobis on the competency issue was denied after a brief hearing on December 4, 1967 because of the "absence of pertinent psychiatric or medical proof." (A. 303.) The denial was affirmed on appeal by the Appellate Division. People v. Mayo, 32 App. Div. 2d 893, 302 N.Y.S. 2d 999 (2d Dep't 1960). Leave to appeal to the New York Court of Appeals was denied on September 15, 1969.

In 1970, Mayo was resentenced nunc pro tunc for the first conviction in 1960 upon a finding that he had not been advised of his right to appeal the 1960 conviction and had not otherwise known of his right to appeal at that time. Mayo then appealed his 1960 conviction on the ground that he was denied effective assistance of counsel. The judgment of conviction was affirmed without opinion by the Appellate Division. People v. Mayo, 41 App. Div. 2d 903, 342 N.Y.S.2d 828 (2d Dep't 1973). Leave to appeal to the New York Court of Appeals was subsequently denied.

1972 Federal Proceedings

An unusual feature of this case is the 1972 habeas corpus hearing that was held before Judge Lasker (A. 102-235.) That hearing involved an attempt to determine nunc pro tunc whether Mayo had in fact been competent in 1960. The focus of that inquiry, as Judge Cannella noted below (A. 316), was different from the focus of the issues raised in this appeal. No question of ineffective assistance of counsel was raised before Judge Lasker because, at that time, Mayo's appeal to the State Courts on that issue was still pending. In addition, the competency inquiry conducted by Judge Lasker involved only a fruitless attempt to determine Mayo's competence nunc pro tunc. Mayo's contention in this petition is that the inconclusive hearing before Judge Lasker did not remedy the failure to hold the required competency determination at the time of his trial.

Judge Lasker "reluctantly" resolved the competency issue adversely to Mayo in 1972 entirely on the basis of the burden of proof, which he held to be Mayo's. (A. 258-59.) Judge Lasker noted that his inquiry was "fraught with difficulty" (A. 258) and that he could not "say whether an inquiry in 1960 would have resulted differently." (A. 259.) Judge Lasker's denial of the writ was affirmed without opinion by this Court. Certiorari was denied by the United States Supreme Court.

At the close of the proceedings before Judge Lasker the State conceded that the history of Mayo's mental illness contained in a presentence report before the Court at the time of sentencing (A. 272-77) -- a report which barely scratched the surface of Mayo's history of emotional disturbance -- required the State to make a competency determination in 1960. (A. 270.) In light of Judge Lasker's inability to say whether such an inquiry "would have resulted differently" from his inquiry in 1972, the conviction must be vacated under the applicable Supreme Court decisions.⁴ That issue, as well as the ineffective assistance of counsel issue, became the twin foci of the habeas corpus petition referred to Judge Cannella.

The Candy Store Robbery and Mayo's Arrest

The robbery for which Mayo was convicted in 1960 took place on a Spring evening in Brooklyn. Mayo, who was white and then seventeen, and an older black companion had spent the afternoon and evening "making a round of bars and grills, drinking beer and whiskey." (A. 273.) During the course of the robbery Mayo struck the store's proprietor, and old woman, for no apparent reason. (Id.) Mayo's companion, one Campbell, still had seven dollars at the time of the robbery (A. 84), and it is unclear whether the

4. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

robbery was premeditated or resulted, like the striking of the old lady, from some sudden impulse of Mayo's. (See A. 76, 274-75.)

The robbery took place at 720 Knickerbocker Avenue in Brooklyn. (A. 24.) Mayo and his companion were arrested a half hour later at a so-called beer garden at 716 Knickerbocker Avenue -- next door to the store they had robbed. (A. 32-33.) The police found \$5.25 on the person of Mayo and \$2.18 on the person of Campbell. (A. 51, 57.) Presumably the balance of their money -- perhaps as much as fifteen or sixteen dollars counting Campbell's original seven dollars -- had been spent on beer consumed during the brief interlude between the robbery and the arrival of the police.

Mayo at first denied but eventually admitted having committed the crime after being taken to police headquarters. (A. 51-53.) At 4 the next morning -- six and a half hours after the arrests -- formal statements were made to a District Attorney. (A. 60, 68.) Mayo's statement, however, was never signed. At his trial Mayo could not remember the arrest or his confession and mumbled confused replies when asked about the circumstances. (A. 78-80.)

Mayo's Background

At the time of the robbery Mayo was seventeen years old. He had spent fifteen of those seventeen years in insti-

tutions, first in a foster home following rejection by his mother (A. 237), later in mental institutions such as the Astor Home for Children to which he had been transferred at age ten for psychiatric treatment (id.) and the Rockland State Hospital to which he had been committed for five and a half years "as a psycopathic personality with possible brain damage" (A. 277) following a certification of insanity in 1953 (A. 289.) About a year before his arrest Mayo had been released from the State mental hospital but was still an out-patient at the Brooklyn Aftercare Clinic. (A. 277.)

The records of these institutions, particularly institutions such as Rockland State Hospital and the Astor Home, speak for themselves. The Clinical Director of the Astor Home, a Dr. Piana, reported "strong evidence of retardation and incoherence" (A. 238.) In fact, he reported that Mayo had "no thought content whatever." (Id.)

The Astor Home records also showed that Mayo had suffered at least one "compulsive seizure." (A. 239.) Dr. Piana had concluded in 1953 that Mayo was a schizophrenic and a "psychotic personality," (id.), and that same year Mayo had been formally certified as "mentally ill" by a Dr. Clardy and committed to a State mental hospital by court order. (A. 289.) In 1961, shortly after his sentencing,

a State psychiatrist, Dr. Bolton, diagnosed Mayo as a "schizoid personality" with a prognosis of "poor." (A. 293.)

The symptoms of Mayo's illness, as described in the institution records, were passivity and withdrawal punctuated by episodes of violent, destructive behavior. (A. 238-40) -- symptoms manifested at the time of his conviction when, after a compulsive robbery and assault, he became "indifferent" (A. 277) and almost impossible to communicate with. In his youth, according to the records of the Astor Home, Mayo had jumped into trees, broken numerous windows and committed other aimlessly destructive acts, often at the urging of other children who "know that Victor will do anything they tell him and * * * use him for their own purposes." (A. 238.) The records of Rockland State Hospital revealed that Mayo had once eaten glass in a suicide attempt. (A. 133.) In fact, Mayo testified in 1972 that he used to eat glass many times -- "every time I got mad and wanted to die." (A. 134.) And if he did not have glass? "I used to bang my head against the wall." (Id.)

Unfortunately, these records were never consulted at the time of Mayo's trial and sentencing. Mayo's attorney was too inexperienced to ask the routine questions that would have disclosed Mayo's sad odyssey of institu-

tionalization and mental disorders. Even when references to "below normal intelligence," a "history of mental illness" and a five and a half year confinement in a State mental hospital appeared in a presentence report, neither counsel nor the trial court pursued them.

"Throwing in the Towel"

Mayo's assigned counsel in 1960 was Michael Washor, now a respected criminal defense attorney whose skills are undoubtedly well known to the court. In April 1960, however, when it was necessary to prepare Mayo's defense, Mr. Washor was less than a year out of law school and had only been admitted to the bar for four months. (A. 116-17.)

Mr. Washor's ability to extract information from John Dean, let alone the "adynamic sphinx" that Victor Mayo was in 1960 (A. 293), would have been severely taxed. Prior to Mayo's trial in September, Mr. Washor met briefly with Mayo once in the bullpen at the courthouse and perhaps a few other times.⁵ (A. 139-40.) None of these meetings lasted more than ten or fifteen minutes (A. 124), and in each Mr. Washor had great difficulty communicating with Mayo. There was, he testified at the 1972 habeas corpus proceeding,

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5. This meeting at the courthouse on the eve of trial is the only one which Mayo remembered. Counsel's testimony in 1972 about other possible meetings was based solely on his recollection of his normal practice, not on specific records or recollection concerning Mayo. (A. 122.)

"an area of lack of complete communication. I was impressed with Mr. Mayo's, shall I suggest, quietness and our conversations were at a minimum." (A. 117.) Counsel's efforts at preparing a defense or exploring issues were nil because Mayo had already "thrown the towel in, was willing 'o take a plea". (A. 130.)

Although Mayo was "willing" to plead guilty, he was unable to do so. As his attorney explained:

"* * * [W]e would be forced to proceed with the trial because the district of Kings County at the time would not grant a severance and allow a plea as to one defendant and try the other defendant, and that I was no even a bit apprehensive as to the finding of the Court because Justice Barshay had indicated, and I suggest again off the record, that we had no great concern here so long as the defendant was not fooling with the Court, was not taking advantage of the Court, was desirous of interposing a plea, amenable both to himself and the prosecution, that my discussions with Mr. Mayo would have been not in the area of the constitutional issue but more in the area that when you do testify, make sure you tell the truth. That would have been limited to that aspect." (A. 130-31.)

The arrangement was that Mayo would stand trial, present no defense, take the stand for a codefendant who was trying to "beat the rap" and admit sole responsibility for the offenses charged.

At trial, counsel waived the opening statement (A. 23), briefly cross-examined the complainant -- apparently for the purpose of demonstrating, for Campbell's

benefit as much as Mayo's, that the crime was conceived by Mayo only after he had entered the candy store (A. 41-49) -- cross-examined the arresting officer in a way that elicited the "opinion" that Mayo had not been intoxicated (A. 59), stipulated an acceptance of a transcript of Mayo's unsigned statement of four o'clock in the morning without challenging the circumstances which attended it (A. 60), made a pro forma motion for dismissal after the State rested, and then rested without presenting any defense. (A. 61-62, 89.) On at least two occasions the trial judge pointedly asked counsel whether certain steps (such as stipulating to the statement) had been taken after consultation with the client. (A. 59-60, 74.) On one of these occasions he asked Mayo if he knew who his counsel was. (A. 74.)

With a defense like this, a finding of guilt was inevitable. And so it was. Mayo's testimony about Campbell's non-participation was not believed, and both boys were found guilty. Mayo received a prison term; Campbell was placed on probation. (A. 73, 98-99.)

At sentencing, counsel advised the court that Mayo had been committed for five years to State mental institutions. That was the total pursuit of the mental health question. Counsel neither investigated the facts concerning

Mayo's history of mental illness himself nor sought to seek a determination of Mayo's sanity or competence under available court procedures.⁶

This failure to inquire into Mayo's mental condition was not the product of some sober balancing of risks and benefits. It was the product of only one thing: assigned counsel's lack of experience. At the 1972 habeas corpus proceeding counsel himself so testified:

"Q. Mr. Washor, if you had known that Mr. Mayo had a practically uninterrupted history of institutionalization and a lengthy history of mental illness, that there were medical reports indicating he had suffered from epilepsy and congenital brain disease or brain damage, what would you have done?

* * *

"A. I do not believe that I would have handled it properly at the time. I had not the sufficient experience to handle it. I suggest that the proper thing for me to have done at the [sic] juncture would have been to have communicated that fact to the Court, having been assigned to represent the individual, and requesting that he be submitted initially for a psychiatric examination so that we could determine in the first instance whether or not he was competent to stand trial absent exploring the aspects of any defense that might be brought to light by the examination." (A. 127.)

Even in this routine case, counsel testified,

"* * * [h]ad I had the information, I would have explored it." (A. 121.)

6. Former Section 658 of the Code of Criminal Procedure, L. 1939, ch. 861, § 2, provided for such a determination "at any time before final judgment."

The Presentence Report

An opportunity to acquire that information was squandered at the time of Mayo's sentencing. The court had before it a presentence report prepared by a State probation officer. (A. 272.) The report disclosed a "history of mental illness," a long period of confinement in a State mental hospital and several other suggestions of mental abnormalities and aberrations. Moreover, its references to Mayo's confinement at Rockland and Astor Home should have put someone on notice that other institutional records relevant to Mayo's competence probably existed.

Specifically, while the probation report overlooked many of the more conspicuous manifestations of mental distress observed at Rockland and elsewhere, it did reveal the following:

1. The report stated that Mayo was "below normal in intelligence" (A. 277), had been placed in an ungraded class because of his "dull mentality," (A. 276) and appeared to the author of the report as "dull."⁷

2. The report noted that Mayo had "a history of mental illness." (A. 274.) Indications of serious mental

7. The author used the term "dull" three times. (A. 274, 276, 277.)

illness had first been observed in early childhood by his mother, and by the staff of the Angel Guardians Home sometime between 1944 and 1953 when Mayo was 1 to 10 years of age. (A. 275.) Because he "did not improve," Mayo was transferred in early 1953 to the Astor Home for Children, a psychiatric treatment center. (Id.) Within months Mayo was committed to Rockland State Hospital "as a psychopathic personality with possible brain damage." (A. 277.)⁸ The diagnosis of brain damage was based on a psychiatric report from the Astor Home that Mayo's "EEG was abnormal." When finally released from the State hospital in 1959 -- about a year before his arrest -- Mayo was placed under the care and supervision of the Brooklyn Aftercare Clinic and was under treatment at the time of his arrest. (Id.)

3. Nothing in the report negated the likelihood that Mayo was still suffering from severe mental impairments that might have affected his ability to communicate with counsel and understand the importance of his trial. The probation officer's observations were consistent with the continued existence of Mayo's symptomatic "emotional

8. Although not noted in the report, commitment had taken place only after Mayo had been formally adjudicated insane in September 1953.

flatness." For example, the probation officer noted that Mayo "makes a rather dull impression" (A. 276-77); that Mayo's mother described him as "an individual without friends who is alone most of the time;" and that Mayo "rarely goes out socially" and "does not go to public places, except in the summer time when he visits Coney Island by himself." (A. 277.) And of course Mayo's actions at the time of his arrest and trial -- a compulsive robbery and assault followed by irrational behavior, confusion, withdrawal and a blind obedience to someone else's wishes without regard to the consequences to himself -- are all consistent with the continued existence of severe psychic disorders.

It was thus known at the time of Mayo's sentencing that Mayo may have been retarded; that Mayo had been receiving psychiatric care up to the time of his arrest since at least 1953 and perhaps even earlier; that Mayo had been institutionalized most of his life and had been committed to a State mental hospital for five and a half years; that he had a serious form of mental illness; that Mayo may have had brain damage; and that there existed psychiatric reports which were in the possession of State agencies and available to the court and counsel. This information clearly should have been sufficient to raise bona fide doubts of

Mayo's competency at the time of trial and to have required some further inquiry into Mayo's mental condition, at least to the extent of obtaining the records relating to Mayo maintained by the State and securing some psychiatric evaluation of Mayo's mental condition.

The point that some further inquiry was required by the probation report was so clear that it was conceded by the State after the 1972 habeas corpus hearing. In a letter to Judge Lasker from the State's attorney dated February 5, 1973 (A. 269-70) it was stated:

"* * * I agree that under People v. Bangert, 22 N.Y.2d 799 (1968), a trial court has an obligation to make some inquiry into a defendant's mental condition at the time of sentencing when it appears in a pre-sentence report that a defendant has a history of mental illness. I also agree that People v. Hudson, 19 N.Y.2d 137 (1967), appears to give retroactive application to Pate v. Robinson. * * *

"Accordingly, * * * petitioner is technically correct in stating that the 1960 trial court was bound to make some inquiry into petitioner's mental state when an indication of mental illness appeared in the pre-sentence report * * *."

The State court in 1960, however, never made any inquiry into Mayo's "mental state." Of course it is always gratifying to know that one is "technically correct" in identifying a constitutional violation. But petitioner's gratification would be more complete if he were someday to receive an effective remedy for the violation he has identified.

The Opinion Below

The court below agreed that if the State court had been required to inquire into Mayo's competence sua sponte in 1960, the only effective remedy would be to vacate the conviction "for it would impose an impermissible burden on the petitioner to make his freedom hinge on a nunc pro tunc determination of his competency". (A. 317.) The court erred, however, in concluding that no further inquiry into competence had been required in 1960.

The court reasoned that the only indicium of mental illness available to the State court was the pre-sentence report which, though it reflected "acute mental illness during * * * childhood and adolescence" (A. 319), left the "overall impression that this condition had improved substantially" by the time Mayo was seventeen. (Id.) Whatever the "overall impression" of this report may have been, it was based largely on superficial interviews by a lay probation officer and his secondhand reports of superficial interviews conducted by others. The court below did not explain how this report could dispense with all further inquiry into the "acute mental illness" which it disclosed, especially when it would have been a simple thing to secure the State's own records relating to Mayo's commitment and treatment in mental hospitals or to

obtain a contemporary psychiatric evaluation specifically directed to the question of competency to be tried. In fact, the State did not vigorously argue below that no further inquiry into competency had been required at the time of Mayo's sentencing, and it conceded in 1972 that the State court had been bound to make such an inquiry. The court below simply ignored the State's own position on this issue.

The court below also held, without a hearing of any kind, that Mayo had not met his burden of proving that he had been denied effective assistance of counsel. (A. 321.) The court reached this opinion despite the fact that Mayo's counsel not only failed to make the routine inquiries that would have given him and the trial court some inkling of Mayo's mental deficiencies, but even failed to attempt to investigate these matters after they were suggested in the presentence report. Since a key function of an attorney representing any criminal defendant -- especially an attorney representing a young and uncommunicative defendant -- is obtaining relevant information that might affect the disposition of the case, this conclusion, too, was in error.

ARGUMENT

- I. MAYO WAS DENIED A FAIR TRIAL
BECAUSE NO INQUIRY INTO HIS
COMPETENCE WAS MADE DESPITE THE
DOUBTS RAISED BY THE PRESENTENCE
REPORT.

A person cannot constitutionally be tried and convicted while he is mentally incompetent and unable to assist in the preparation of his own defense. Drope v. Missouri, 420 U.S. 162, 171-72 (1975); Pate v. Robinson, 383 U.S. 375 (1966). The minimum standard of mental competence to be tried is that approved by the Supreme Court in Dusky v. United States, 362 U.S. 402 (1960) and quoted with approval in Drope v. Missouri, supra. It is not enough that a defendant be oriented in time and space and have "'some recollection of events.'" The test is whether he "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'" Dusky v. United States, supra, 362 U.S. at 402; Drope v. Missouri, supra, 420 U.S. at 172.

The Supreme Court held in Pate v. Robinson that a State court is constitutionally obliged to secure a determination of competence -- whether or not it is requested by the defendant or his attorney -- whenever the Court is on notice of facts suggesting a bona fide doubt of the defendant's

competence. The Court reaffirmed these principles in Drope v. Missouri. A conviction secured in the absence of a required competency determination cannot constitutionally stand.

In Mayo's case bona fide doubt existed because of the suggestions of a history of mental illness, retardation and possible brain damage disclosed by the presentence report at the time of Mayo's sentencing. This point was not seriously contested by the State below and was even conceded at the conclusion of the 1972 hearing before Judge Lasker. (A. 269-70.)

The State's argument below was essentially that the failure to make a competency determination in 1960 had been cured because competency had supposedly been determined nunc pro tunc either a) in the State's 1967 coram nobis proceeding -- a proceeding in which relief was denied solely because of the "absence of pertinent medical or psychiatric proof" (A. 303); or b) in the 1972 hearing before Judge Lasker -- a hearing in which Mayo was given an insuperable burden of proof, a hearing which Judge Lasker himself noted was "fraught with difficulty" and a hearing which Judge Lasker concluded by noting that he "could not say whether an inquiry in 1960 would have resulted differently." (A. 258-59.) Judge Cannella succinctly expressed the defect in both proceedings:

" * * * If the circumstances warranted such an inquiry [a sua sponte inquiry into competence] the writ would have to be granted, for it would impose an impermissible

burden on the petitioner to make his freedom hinge on a nunc pro tunc determination of his competency." (A. 317, citing Pate v. Robinson, supra, 383 U.S. at 386-87.)

Accord, e.g., Drope v. Missouri, supra, 420 U.S. at 183; Dusky v. United States, supra, 383 U.S. at 403; Rand v. Swenson, 501 F.2d 394, 395-96 (8th Cir. 1974); Moore v. United States, 464 F.2d 663, 666-67 (9th Cir. 1972). See also United States v. DiGilio, 538 F.2d 972, 987-88 (3d Cir. 1976), appeal pending (under 18 U.S.C. § 4244 burden of proof cannot be placed on defendant).

The factors relevant to determining whether a sua sponte inquiry is warranted were stated by the Supreme Court in Drope:

"The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts." Drope v. Missouri, supra, 420 U.S. at 180.)

As the Ninth Circuit stated in Moore v. United States, supra:

"Under the rule of Pate v. Robinson * * *, a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. 'Substantial evidence' is a term of art. 'Evidence' encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial. * * * At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. * * * The trial court's 'failure to make such inquiry thus deprived [Moore] of his constitutional right to a fair trial' * * * unless we can say that there was before the trial court no substantial evidence casting doubt upon his competency at any time before he was sentenced." Moore v. United States, supra, 464 F.2d at 666 (citations to Pate v. Robinson omitted).

In Moore, the trial court had before it a psychiatric report suggesting that the defendant there, like Mayo here, had a long and well-documented history of mental illness. The psychiatrist had nevertheless concluded his report by opining without elaboration that the defendant was competent to stand trial. The court held that this conclusion was not sufficient in itself to dispel the doubts of competence raised in the body of the report by the evidence of a history of mental illness.

In Drope the Supreme Court observed that in Pate the Supreme Court had determined that a long history of "irrational behavior" required further inquiry "notwiths 3 Robinson's demeanor at trial and the stipulated opin. a psychiatrist that Robinson knew the nature of the charges against him and could cooperate with counsel when the psychiatrist examined him two or three months before." Drope v. Missouri, supra, 420 U.S. at 172-73 n. 9.

In United States v. Polisi, 514 F.2d 977 (2d Cir. 1975), this Court held that "reasonable cause" to believe that a defendant was incompetent under 18 U.S.C. § 4244 -- the federal analogue of the New York State procedures that should have been invoked with respect to Mayo in 1960 -- existed from two sources: first, a presentence report which indicated that defendant was receiving out-patient medication from a Veterans Administration hospital and had been determined to have a service-connected disability involving schizophrenia (id. at 978); and second, a psychiatric report prepared for sentencing purposes under 18 U.S.C. § 4208(b) that had concluded that "there was no evidence of overt delusional thinking" although there was evidence of "chronic undifferentiated schizophrenia." (Id. at 979). The court held that these two items "at least provided the reasonable cause" to hold a competency determination. Id. at 980.

The same was true with respect to the disclosures of similar mental problems in Mayo's presentence report. The appropriate statutory vehicle for making further inquiry into a defendant's mental state in New York at the time of Mayo's trial was the procedure specified in Sections 658 through 662 of the former New York Criminal Procedure Law. Under this procedure, as under Section 4244 of Title 18 of the United States Code, the customary practice would have been to order a psychiatric examination of Mayo, specifically directed to the question of Mayo's competence to stand trial. The results of the psychiatric examination would have been embodied in a written report which could have been controverted by either the State or the defendant at an adversary hearing. The court itself, of course, would have been obliged to hold a hearing sua sponte under Pate if it still entertained reasonable doubt of Mayo's competence in light of the psychiatric report. Presumably many of the psychiatric profiles and other records in the State's possession relating to Mayo's history of mental illness would also have been secured at some point in the proceeding.

Judge Canella held that no further inquiry had been required in Mayo's case because "[t]he only information concerning Mayo's mental history available

to the court was contained in the presentence report prepared by the probation department." (A. 318-19.) According to the district court that report showed a history of "acute mental illness" during childhood and adolescence but left the "overall impression" that the "condition had improved substantially by the time of the events in question" when Mayo was seventeen or eighteen. (Id.) Judge Cannella pointed particularly to the probation officer's inaccurate hearsay report that a lay social worker considered Mayo's progress⁹ "good" and to the probation officer's own rather ambiguous observations that Mayo "'makes a rather dull impression but seems to understand the implications of his offense and could discuss it with some degree of intelligence, although appearing almost indifferent.'" (Id., quoting A. 276-77.)

The crucial thing about the report was not the "overall impression" it might leave with different readers, but the fact that it contained several pointed hints of deep-seated mental and emotional problems that could obviously impede the ability to consult rationally with counsel and assist in the preparation of a defense. The report recited,

9. In fact, Mayo's record showed many missed appointments, and Mayo would not have been released without a further psychiatric examination. (A. 279-87.)

for example, that Mayo had a "history of mental illness;" that he had been receiving psychiatric treatment since some time before 1953 until the time of his arrest; that he had been committed to a State mental hospital because of "suspicion of mental illness" and had spent the next five and a half years there; that he had spent most of his life in institutions (all of which had easily obtainable records) specializing in the care and treatment of disturbed children and adolescents; that he was still undergoing out-patient therapy at the time of his arrest; that he had been diagnosed "as a psychopathic personality with brain damage;" that his "EEG was abnormal;" that he was "below average in intelligence;" and that "emotional flatness has been a characteristic since youth."

The "overall impression" left by the report could not dispel the doubts of competency raised by revelations such as these. The impressions derived by the probation officer from records of State mental institutions should not be a permissible substitute for consultation of the records themselves.

In Mayo's case the records would have indicated that Mayo had been declared legally insane when committed to Rockland; may have been retarded; may have been brain-damaged; had made suicide attempts by eating glass each time he got

mad and "wanted to die;" had been diagnosed as a schizophrenic with hebephrenic tendencies; displayed a mental predisposition to becoming withdrawn, uncommunicative and self-destructive in times of stress; and could be manipulated by others without regard to the consequences to himself -- all traits relevant to his ability to conduct a defense and all traits consistent with his behavior at trial. This material was all available in State records, and some of it at least was seen by the State's probation officer. The State should be chargeable with what an examination of the records themselves would have shown. United States ex rel. Evans v. Kropp, 254 F. Supp. 218 (S.D. Mich. 1966).

Moreover, the probation officer's observations could not be relied on to resolve the doubts of competence raised in his own report. Moore v. United States, supra. The officer's observations were hearsay statements based in large part on derivative information. The officer's summaries do not constitute the evaluation of a qualified psychiatrist nor even a trial judge's evaluation of demeanor.¹⁰ In fact,

10. The trial court's ability to observe demeanor has been held by this Court to be of some weight in deciding whether a competency determination is necessary. United States v. Hall, 523 F.2d 665, 667-68 (2d Cir. 1975); United States v. Vowteras, 500 F.2d 1210, 1212 (2d Cir. 1974), cert. denied, 419 U.S. 1069 (1975). But see Drope v. Missouri, supra, 420 U.S. at 172-73 n.9; United States v. Masters, 539 F.2d 721, 728 (D.C. Cir. 1976) (such observations could not dispel doubts raised by record of retardation.) The cases relying on demeanor at trial are

(footnote continued on following page)

the probation officer's observations were not even made for the purpose of assessing competency to be tried. Many of his observations are fatally ambiguous for this purpose: what does one make, for example, of the statements that Mayo "makes a rather dull impression," could discuss the crime with "some degree of intelligence" and appears "almost indifferent" to his fate? (A. 276-77) (emphasis added).

It would be a strange rule indeed if the ambiguous, hearsay observations of lay personnel involved in the State's criminal justice system could erase the doubts of competency raised by the State's own records, especially when the contents of those records are reported only in superficial and fragmentary terms to the court. The issue is not what a court's "overall impression" of competence should have been based only on the information contained in the presentence report. The question is whether the report contained sufficient suggestions of mental impairment to have required the Court to obtain further, more definite information. As the State conceded in 1972 as a matter of the State's own interpretation of its obligations under Pate v. Robinson (A. 269-70),

(footnote continued from preceding page)

ones where the suggestion of psychic disorder was less pervasive than in Mayo's case and where a specific assessment of the need for such a hearing could be made because the defendant had moved for it. The trial court in Mayo's case made no specific findings on demeanor, the trial was so perfunctory that such findings would have been almost impossible to make, and Mayo's behavior at trial was essentially that of a cipher: his testimony was confused and monosyllabic, and he did not communicate with his attorney. In fact, the trial court had to ask him if he knew who his attorney was. (A. 74.)

there is a clear answer to that question. In light of the State's inability to establish Mayo's competency affirmatively many years after the fact it dictates that Mayo's conviction be vacated.

II. MAYO WAS DENIED EFFECTIVE
ASSISTANCE OF COUNSEL BECAUSE
HIS ATTORNEY FAILED TO INVESTIGATE
MATTERS MATERIAL TO MAYO'S DEFENSE

The court below held that Mayo had not established an ineffective assistance of counsel case because Mayo's mental problems were not apparent until the time of sentencing and because counsel's representation of Mayo -- such as it was -- coincided with Mayo's wishes. (A. 320.) The basic ineffectiveness of counsel in this case, however, was counsel's failure to make rudimentary inquiries about Mayo's background. These inquiries are ones which it is the minimal professional obligation of a defense attorney to make in any case, the seemingly trivial \$17 candy-store robbery as well as the cause celebre. Had such inquiries been made in Mayo's case, counsel could have questioned the wisdom of Mayo's "wishes" to "throw in the towel" and could have pursued the question of competence and related issues (sanity; the voluntariness of Mayo's confession at four in the morning) material to Mayo's defense and sentencing.

The right to the effective "assistance of counsel" in the preparation and presentation of a defense is of course a fundamental right guaranteed to an accused by the Sixth

Amendment and made applicable in State proceedings by the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). The fact that Mayo's offenses were relatively petty and the case itself seemingly cut-and-dried did not relieve assigned counsel of his minimal professional obligations to explore his client's background and the circumstances of his arrest:

"[E]ven in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value." Reynolds v. Cochran, 365 U.S. 525, 532-33 (1961).

The court below observed that this Court continues to adhere to a stringent "farce and mockery of justice" standard in deciding ineffective assistance of counsel cases. (A. 321.) Other circuits, regarding this standard as a vestige of the days when right to counsel cases were decided solely under the due process clause rather than by application of the Sixth Amendment, have eschewed this rigorous standard in favor of one based on the "reasonableness" of counsel's performance.¹¹ See, e.g., United States ex rel.

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11. It is worth noting that in determining whether guilty pleas have been voluntarily made on the basis of effective advice by counsel, the Supreme Court has defined the standard of effective assistance as one "within the range of competence demanded of attorneys in criminal cases," McMann v. Richardson, 397 U.S. 759, 771 (1970), or "based on the practices of reasonably competent attorneys experienced in the day-to-day business of representing criminal defendants in a trial court." Henderson v. Morgan, _____ U.S. _____, 96 S. Ct. 2253, 2263 (1976) (Rehnquist, J., with whom Chief Justice Burger joined, dissenting).

Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730, 736-37 (3d Cir. 1970). See generally Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L. Rev. 927, 939 (1973); Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1077 (1973); Note, The Jailed Pro Se Defendant and the Right to Prepare a Defense, 86 Yale L. J. 292, 296-97 & authorities cited n.19 (1976). This Court's own continued adherence to the "farce and mockery of justice" standard may now be a matter of some doubt following the recent panel decision in Rickenbacker v. Warden, Docket No. 76-2036, slip opinion at 1070-71 (2d Cir. December 22, 1976); id. at 1075-76 (Oakes, J., dissenting).

In the present case any difference in the appropriate standards should occupy only the "harmless drudges" of the law reviews. Mayo's petition does not turn on a "hindsight" evaluation of tactics or actual performance in the conduct of a trial. United States ex rel. Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967). Rather, this case turns on a complete failure, caused only by counsel's admitted inexperience, to investigate -- before, during or after trial -- Mayo's history of mental illness

and other issues material to the defense. This failure to make even the most routine background inquiries or attempt to investigate a history of mental illness even after it was disclosed at sentencing constituted ineffective assistance of counsel under any standard.

A. Trial Counsel's Failures to Inquire About Mayo's Background and Investigate Mayo's History of Mental Illness
Constituted Ineffective Assistance of Counsel In Themselves

When the Supreme Court originally confirmed the right to effective assistance of counsel in 1932 in Powell v. Alabama, supra, it identified the "critical period" for having counsel as the time before trial begins:

"* * * from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." Powell v. Alabama, supra, 287 U.S. at 57. See also Hawk v. Olson, 326 U.S. 271, 278 (1945); Brescia v. New Jersey, 417 U.S. 921, 924-25 (1974) (Justices Marshall and Brennan dissenting from denial of petition of certiorari),

This court and others applying the "farce" and "mockery of justice" standard have recognized that the failure to investigate matters material to the defense constitutes ineffective assistance of counsel. Saltys v. Adams, 465 F.2d 1023, 1028-29 (2d Cir. 1972); McQueen v. Swenson,

498 F.2d 207, 216-17 (8th Cir. 1974); Brubaker v. Dickson, 310 F.2d 30, 37-39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963); United States ex rel. Thomas v. Zelker, 332 F. Supp. 595, 600 (S.D.N.Y. 1971); People v. Bennett, 29 N.Y. 2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972). See also United States v. Morrissey, 461 F.2d 666, 669-70 & n.6 (2d Cir. 1972); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 47-48 (2d Cir. 1972) (dissenting opinion of Kaufman, J.), cert. denied, 410 U.S. 917 (1973).

Among the matters material to any defense are facts about the defendant's background, especially facts pertinent to a history of mental illness. Such facts may relate to a defendant's capacity to be tried, his sanity or degree of mens rea at the time of the alleged crime and the voluntariness of his confession.¹² In Owsley v. Peyton, 368 F.2d 1002, 1003 (4th Cir. 1966), the Fourth Circuit held that counsel's failure to investigate and adduce facts suggesting a reasonable doubt of defendant's competence to stand trial constituted ineffective assistance of counsel per se. Similarly, in Brubaker v. Dickson, supra, 310 F.2d at 37-39, the Ninth Circuit -- a circuit which applies the same standard

12. A defendant's age, level of education, intelligence, maturity, experience, and prior criminal record as well as length of interrogation and interrogation practices are relevant to an inquiry concerning the possible coercion of a confession. See, e.g., Spano v. New York, 360 U.S. 315, 321-24 (1959); Fikes v. Alabama, 352 U.S. 191, 196-97 (1957).

for ineffective assistance of counsel as that historically
¹³
 applied by this Court -- held that a failure to investigate
 the circumstances of a confession and the nature of a criminal
 defendant's mental illness would constitute denial of effective
 assistance of counsel. See also People v. Bennett,
supra; In re Saunders, 2 Cal. 3d 1033, 472 P.2d 921, 931-32,
 88 Cal. Rptr. 633 (1970) (California Supreme Court en banc).

The law could not well be otherwise. The duty to
 investigate a defendant's background and to explore matters
 such as mental health when the slightest suspicion about
 them arises from any source is a minimal professional obligation
 of any attorney in any criminal case. The reason
 that a lawyer has this duty to make some reasonable attempt
 at inquiry is that such background investigations are considered
 a sine qua non for the preparation of an effective
 defense.

These are not radical doctrines. They are the essence
 of Powell v. Alabama, supra, and have been incorporated
 in the minimal defense standards proposed for lawyers in
 criminal cases by the American Bar Association. See ABA

13. Brubaker v. Dickson, supra, 310 F.2d at 37. The Brubaker
 test was cited with approval in at least three of this
 Circuit's most stringent "farce and mockery of justice"
 cases. United States v. Yanishefsky, 500 F.2d 1327,
 1333-34 (2d Cir. 1974); United States ex rel. Marcelin v.
Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied,
 410 U.S. 917 (1973); United States v. Garguilo, 324 F.2d
 795, 796 (2d Cir. 1963).

Standards Relating to the Defense Function § 3.2(a) official comment (Tent. Draft 1970, approved 1971). In the few years they have been in existence the ABA Standards, and particularly the duty to conduct background investigations and explore issues such as mental illness which they incorporate, have been officially adopted as part of the minimum standards for effective representation in some jurisdictions, United States v. Wright, 489 F.2d 1181, 1188 n.6 (D.C. Cir. 1973); United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973); State v. Harper, 57 Wisc. 2d 543, 205 N.W. 2d 1, 9 (1973), and have been looked to for essentially the same purpose by several other courts, including the New York Court of Appeals and other courts applying the farce and mockery of justice standard. McQueen v. Swenson, supra, 498 F.2d at 216-17; People v. Bennett, supra, 29 N.Y.2d at 466-67, 280 N.E.2d at 639, 329 N.Y.S.2d at 804; Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 31-33 (1973).

Mayo's apparent willingness to plead guilty and to confess at trial did not relieve defense counsel of his duty to investigate these matters. As stated in the Defense Function Standards:

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt

or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty." Defense Function Standards § 4.1.

The official commentary further explains why this duty to investigate is essential to effective representation:

"The lawyer's duty to investigate is not discharged by the accused's admission of guilt to him or by his stated desire to enter a guilty plea. The accused's belief that he is guilty in fact may often not coincide with the elements which must be proved in order to establish guilt in law. In many criminal cases the real issue is not whether the defendant performed the act in question but whether he had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to his intent in determining his criminal liability or responsibility. Similarly, a well-founded basis for suppression of evidence may lead to a disposition favorable to the client. The basis for evaluation of these possibilities is the lawyer's factual investigation for which the accused's own conclusions are not a substitute.

"The lawyer's duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt in law, not in some moral sense. * * *

"The lawyer also has a substantial and very important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant himself. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships and the like will be relevant, as will mitigating circum-

stances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to deter or abandon prosecution and will be relevant at trial and at sentencing."

At the very least, as soon as counsel learned from the presentence report that Mayo had been committed to a State mental hospital and had received treatment for five years, counsel was under an obligation to move to investigate petitioner's sanity and competency and perhaps to request that the appropriate psychiatric examinations be made. 14

As stated in Section 8.1(b) of the Defense Standards:

"Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, he should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation * * *."

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14. Under former section 658 of the New York Code of Criminal Procedure, counsel could have sought a determination of Petitioner's sanity and competency "any time before final judgment," i.e., before the conviction became final. See People v. Sprague, 11 N.Y.2d 951, 183 N.E.2d 232, 228 N.Y.S.2d 832 (1962) (semble); People v. Boundy, 10 N.Y.2d 518, 520-21, 180 N.E.2d 565, 567, 225 N.Y.S.2d 207, 209 (1962); People v. Smyth, 3 N.Y.2d 184, 187, 143 N.E.2d 922, 924, 164 N.Y.S.2d 737, 739 (1957)

It was plainly insufficient for counsel to do nothing more than call Mayo's confinement in a mental hospital to the attention of the court at the time of sentencing. Counsel was under an obligation to apprise himself, and if necessary the court, of the full extent of Mayo's mental illness.

Nor is it any excuse that counsel only became "aware" of petitioner's mental history when he read the presentence report. (A. 320.) There was only one reason why counsel was not "aware" of the many facts relevant to Mayo's mental condition sooner or in more meaningful detail. As counsel himself candidly admitted before Judge Lasker, he had not "sufficient experience" to "broach" the question of competency or make the routine investigations about petitioner's background that would have elicited such facts. (A. 118, 120-21, 125-28.) This failure to attempt any investigation of petitioner's background even before sentencing was an inexcusable omission. See Tinsley v. United States, No. 75-1607 at n. 2 (4th Cir. April 5, 1976) (ineffective assistance of counsel established if "minimal communication" with defendant prevented counsel from learning of suicide attempt).

Here, the simplest inquiries would have revealed such matters as petitioner's mental retardation, the details

of his history of institutionalization, his eating of glass and other attempts at suicide and self-mutilation, episodes of purposeless, self-destructive behavior, the repeated references to "emotional flatness", the reports indicating that he had possible brain damage and epilepsy, the diagnosis of schizophrenia and the adjudication that Mayo was mentally ill in 1953. (See pages 8-10, supra.) Trial counsel acknowledges that once even some of these facts were known, the "proper thing" (A. 127) would have been to pursue a competency determination and perhaps even an insanity defense: "[H]ad I had the information, I would have pursued it." (A. 121.)

Counsel's failure to pursue these issues cannot be justified by saying that counsel was not aware of Mayo's mental condition. Even as assigned counsel in a seemingly routine case, counsel had a duty to ask the questions that would have led to awareness.

B. Trial Counsel's Failure to
Investigate Deprived Mayo of
a Fair Trial and Meaningful
Representation of His Interests

Because of counsel's failure to investigate, Mayo was railroaded through a trial without any serious effort to present a defense, or even to seek appropriate treatment for Mayo. Mayo's trial was not a bona fide contest on any issue. Rather, by pre-arrangement of defense counsel and the prosecutor,

no defense was presented, the admissibility of a confession made at four o'clock in the morning after an evening of drinking by a seventeen year-old boy who had spent many years in mental institutions went unchallenged and Mayo was allowed to testify for the codefendant and assume sole responsibility for the offenses charged.

Similarly, at sentencing, although defense counsel knew that Mayo had been legally committed to a State mental hospital as a mentally ill person for over five years and was apparently presented with other suggestive information in the presentence report, counsel never investigated Mayo's history of mental illness or sought a determination of petitioner's sanity and competency.

Finally, defense counsel failed to advise petitioner of his right to appeal.

Defense counsel's perfunctory, pro forma representation at trial and sentencing was constitutionally deficient: "There can be no quarrel with the proposition that the right to counsel means the right to conscientious services of competent counsel. * * * Mere perfunctory appearance for a defendant is not enough. * * *" United States v. Wight, 176 F.2d 376, 378 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). See also Walker v. Caldwell, 476 F.2d 213, 221-24 (5th Cir. 1973); Smotherman v. Beto, 276 F. Supp. 579, 585-89 (N.D. Tex. 1967).

The court below reasoned that this nominal representation was effective because it comported with Mayo's "original intention." (A. 320.) But counsel's failure to object to the admission of Mayo's statement to the police and his failure to request the court to determine Mayo's sanity and competence did not stem from deliberations with his client. Conversations between attorney and client here were "at a minimum." (A. 117.) These omissions all stemmed entirely from counsel's inexperience and his failure to investigate prior to trial Mayo's background and the circumstances surrounding Mayo's arrest.

The Ninth Circuit stated the law applicable to these circumstances in Brubaker v. Dickson, supra, a case cited with approval three times by this Court:¹⁵

"Upon an examination of the whole record, we conclude that appellant alleged a combination of circumstances, not refuted by the record, which, if true, precluded the presentation of his available defenses to the court and the jury through no fault of his own, and thus rendered his trial fundamentally unfair. Appellant does not complain that after investigation and research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare, and that defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all. The omissions alleged by

15. See note 13, supra.

appellant 'were not mere mistakes of counsel or errors in the course of the trial. If true, they constituted a total failure to present the cause of the accused in any fundamental respect. Such a proceeding would not constitute for the accused the fair trial contemplated by the due process clause * * *.'" (Footnotes omitted.) Brubaker v. Dickson, supra, 310 F.2d at 38-39, quoting Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945).

In Brubaker v. Dickson the matters which counsel was alleged to have failed to investigate included the admissibility of a confession and the petitioner's state of mental illness. As a result, it was alleged, counsel had been unable adequately to represent the petitioner's interests at trial and at sentencing. The court held that if the allegations were established, petitioner's conviction would be unconstitutional.

Similarly, in Smotherman v. Beto, supra, 276 F. Supp. at 585-89, the court held that the petitioner was denied due process of law where inexperienced defense counsel failed to object to admission of a confession, failed adequately to investigate and prepare an insanity defense and failed to advise petitioner of his right to appeal. In West v. Louisiana, 478 F.2d 1026, 1032-34 (5th Cir. 1973), modified on other grounds en banc, 510 F.2d 363 (5th Cir. 1975), the Fifth Circuit indicated that it would amount to ineffective assistance of counsel and a

denial of due process for an assigned defense counsel to conduct no investigation, call no witnesses and rest after denial of a motion for a directed verdict. See also Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

All of the failures in these cases occurred in Mayo's 1960 trial. No defense was presented. No strategy or tactic other than conceding guilt was even considered by Mayo's attorney. If Mayo was left with no alternative to becoming a convicted felon and serving a significant jail term in 1960, it was because his attorney was not "sufficiently experienced" to find or even look for the possible alternatives.

Conclusion

The order denying the petition should be reversed. Petitioner should either be retried forthwith for his first crime or his conviction for the first crime should be vacated and he should be resentenced for the second crime.

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Respectfully submitted,

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